PD-0354&0355-21
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
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DEANA WILLIAMSON
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Nos. PD-0354-21 & PD-0355-21

TO THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
6/24/2021
DEANA WILLIAMSON, CLERK

EDWIN ANTONIO OSORIO-LOPEZ, Appellant

v.

STATE OF TEXAS, Appellee

Appeal from Upshur County, Trial Causes 17,914 & 17,927
Nos. 06-18-00197-CR & 06-18-00198-CR

* * * * *

STATE'S PETITION FOR DISCRETIONARY REVIEW

* * * * *

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IDENTITY OF JUDGE, PARTIES, AND COUNSEL

TRIAL (Oct. 2018)

Judge..... **Hon. Lauren Parish**
Presiding Judge, 115th District Court, Upshur County

State..... Upshur County D.A. **Billy Byrd**
405 Titus Street, Gilmer, Texas 75644

Appellant, Edwin Osorio-Lopez ..... **Matthew Patton, III**
316 Titus Street, Gilmer, Texas 75644

RETROSPECTIVE COMPETENCY (Feb. 2020)

Judge..... **Hon. Dean Fowler**
Presiding Judge, 115th District Court, Upshur County

State..... Upshur County A.D.A. **Sarah Cooper**
405 Titus Street, Gilmer, Texas 75644

Appellant (initially represented by) ..... **Matthew Patton, III**
316 Titus Street, Gilmer, Texas 75644

COURT OF APPEALS

State..... Upshur County A.D.A. **Sarah Cooper**
405 Titus Street, Gilmer, Texas 75644

Appellant..... **Jonathan Hyatt**
P.O. Box 7935, Longview, Texas 75607

COURT OF CRIMINAL APPEALS

State..... Asst. State Prosecuting Attorney **Emily Johnson-Liu**
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Appellant..... **Jonathan Hyatt**
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Nos. PD-0354-21 & PD-0355-21

TO THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

EDWIN ANTONIO OSORIO-LOPEZ, Appellant

v.

STATE OF TEXAS, Appellee

* * * * *

STATE'S PETITION FOR DISCRETIONARY REVIEW

* * * * *

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

To exercise the right of self-representation under *Faretta v. California*, 422 U.S. 806, 819 (1975), a defendant must necessarily waive his right to counsel. Doing so in the midst of a competency hearing ordinarily raises questions about the validity of that waiver. But the court of appeals uncritically extended this concern to a retrospective competency hearing and, on that basis, concluded that there was no right of self-representation. This case doesn't raise that issue. Instead, the real issue is whether Appellant, who was presumed competent, intelligently and knowingly waived counsel. And to that question, the court of appeals erred in implicitly deciding that no defendant's waiver at a retrospective hearing could be valid.

STATEMENT REGARDING ORAL ARGUMENT

Believing that this is really a question of trial court discretion and not whether constitutional rights are inapplicable as the court of appeals suggests, the State does not request argument. Should the Court decide on its own motion to grant the issue the court of appeals poses, the State requests argument.

STATEMENT OF THE CASE

Appellant was convicted of evading with a vehicle and aggravated assault, and the jury assessed two $10,000 fines and a 10-year and 20-year prison term, respectively. 6 RR 176, 204. The court of appeals abated for a retrospective competency hearing. At the hearing, the trial court permitted Appellant to represent himself. Retro-RR at 5-6. When the appeal resumed, he argued this was error. The court of appeals held that defendants in retrospective competency hearings have no right of self-representation, reversed, and remanded for another hearing at which counsel would represent Appellant. *Osorio-Lopez v. State*, Nos. 06-18-00197-CR & 06-18-00198-CR, 2021 WL 1583885, at *1 & 2021 WL 1583890, at *6 (Tex. App.—Texarkana, Apr. 23, 2021).

STATEMENT OF PROCEDURAL HISTORY

The court of appeals issued mirror opinions in both cause numbers on April 23, 2021. One of the opinions was published. *Osorio-Lopez*, ___ S.W.3d ___, No.

06-18-00197-CR, 2021 WL 1583890. No motion for rehearing was filed. This Court granted the State an extension to file this petition by June 23, 2021.

GROUND FOR REVIEW

> Is a trial court presiding over a retrospective competency hearing required to force counsel on an unwilling defendant who is presumed to be competent?

ARGUMENT

Background

After indictment in both cases, Appellant was evaluated, found incompetent, and committed to a state hospital. 3 RR 14; 5 RR 5; 4-10-19 (17915) CR 23-34.[1] His competency was restored within 120 days. 4-10-19 (17915) CR 36-40.

At his trial later in 2018, Appellant's counsel asked for a continuance to have Appellant re-evaluated, but this was denied. 6 RR 10-12; CR 24-27. Appellant testified at both phases of trial, and the jury ultimately convicted. 6 RR 176.

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[1] The trial record will be designated "RR" preceded by the volume number and followed by the page number. The retrospective competency record will be similarly designated "Retro-RR." Most clerk's record citations will be to the evading case (Cause 17914). The original clerk's record will be designated "CR"; later volumes will be referred to by date followed by the trial cause number in parentheses. Also cited is the clerk's record in a companion case (Cause 17915) for unauthorized use of a motor vehicle. That offense was ultimately dismissed following Appellant's conviction for evading and aggravated assault, but a clerk's record was prepared and filed with the appeal for the convicted offenses. As far as the State has found, it is the only clerk's record that contains the pre-trial competency documents.

On appeal, Appellant argued it was error to refuse his request for a competency evaluation. *See* App. Original COA brief at 10-12. The court of appeals abated the cases for a retrospective competency hearing. *See* Aug. 14, 2019 Order, Nos. 06-18-00197 & 198-CR, Sixth Court of Appeals (available here).

Before the hearing, Appellant's appellate counsel suggested he was still not competent. 3-10-20 (17914) CR 16-21. On the trial court's order, Appellant was re-evaluated, and the court-appointed psychologist concluded Appellant met the competent-to-stand-trial standard, as he had the present ability to consult with his attorney with a "reasonable degree of rational understanding if he so chooses." *Id*. at 4-7. After brief questioning of Appellant at the retrospective hearing about whether he wanted to represent himself, Appellant was permitted to do so. Retro-RR 5-6. The trial court heard testimony from the district attorney (who had initially asked for Appellant's pretrial evaluation) and Appellant's court-appointed interpreter. It ultimately found that Appellant had been competent during the 2018 trial. *Id*. at 17; 3-9-20 (17914) CR 4.

Continuation of Appeal

On further briefing in the court of appeals, Appellant argued it was error to permit him to represent himself. The court of appeals agreed but specified that it was "not based on any alleged shortcomings in the trial court's [*Faretta*] admonishments,

but …on the inapplicability of the right to self-representation in the proceeding below, i.e., one to determine Osorio-Lopez's competency at the trial of conviction." *Osorio-Lopez*, 2020 WL 1583890, at * 5. It cited several federal circuit holdings that the trial court cannot simultaneously question a defendant's competence to stand trial and determine, as *Faretta* requires, that he has knowingly and intelligently waived his right to counsel. *Id*. at *6. It ordered a new retrospective competency hearing during which Appellant will be represented by counsel. *Id*.

The issue is not about the right of self-representation.

The court of appeals erred to hold that there is no self-representation right during a retrospective competency hearing for three reasons. First, that wasn't Appellant's complaint on appeal. Instead, his statement of the issue was that "[t]he trial court abused its discretion by . . . allowing [him] to represent himself...." and he relied on exchanges in the record to show error on the facts of his case. App.'s COA Brief on Competency at 10-13. While he posited that TEX. CODE CRIM. PROC. Ch. 46B required counsel be appointed, he never alleged that *Faretta* was inapplicable.

Second, in deciding whether the right of self-representation applies, the court of appeals considered none of the relevant factors—*e.g*., the text of the constitutional provisions, historical recognition of the right in competency proceedings, and applicability of the *Faretta* rationale to retrospective hearings. Even if it had done

so, a proper analysis does not provide an easy route to resolving the case.[2]

Third, having a right of self-representation implies that a defendant could *force* a trial court to let him proceed *pro se*. This case didn't present a basis for deciding that issue at trial—and doesn't now—since the trial court *permitted* Appellant to represent himself. *See* TEX. R. APP. P. 33.1.[3] Even if, as the court of appeals held, there is no *right* to self-representation, this does not mean that a trial

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[2] There are several arguments to support application to a competency hearing. The right to self-representation recognized in *Faretta* is a trial right. *Martinez v. Ct. App. of California, Fourth Appellate Dist.*, 528 U.S. 152, 154 (2000). Although Appellant never invoked any particular basis (federal or state constitution or otherwise) to proceed *pro se*, under the Texas Constitution the accused's express "right of being heard by himself" applies "[i]n all criminal prosecutions." TEX. CONST. art. I, § 10. Like the implicit federal constitutional right, it appears in a list of rights tied to trial. Even if not actually a part of trial, a competency hearing under TEX. CODE CRIM. PROC. Ch. 46B (conducted pretrial, during trial, or retrospectively) is integral to trial itself. It determines whether trial can proceed. TEX. CODE CRIM. PROC. arts. 46B.053, 46B.055. And the correlative right to counsel, since it almost always occurs after attachment of the right, is applicable to competency hearings. *Cf. Purtell v. State*, 761 S.W.2d 360, 374 (Tex. Crim. App. 1988) (right of counsel not applicable *during evaluation*).

There are also several arguments against its application. *Faretta*'s rationale for affirming the dignity of the individual is undermined if the defendant is not actually competent. *Indiana v. Edwards*, 554 U.S. 164, 176 (2008) (permitting higher standard for competency to proceed *pro se* at trial and not addressing application to a competency trial). Also, since a retrospective hearing is part of an appeal, it necessarily has similar characteristics as an appeal, for which there is no self-representation right, *Martinez*, 528 U.S. at 162-63. For example, Appellant was no longer presumed innocent; the hearing came about through a process Appellant initiated, rather than at the State's insistence; and its potential outcomes—the conviction will stand or he will require a new trial, *Ex parte Winfrey*, 581 S.W.2d 698, 699 (Tex. Crim. App. 1979)—are appellate remedies.

[3] By contrast, the correlative issue in the case (whether the defendant waived his right to counsel) need not have been preserved. *Saldano v. State*, 70 S.W.3d 873, 888 (Tex. Crim. App. 2002) (right to assistance of counsel is waivable-only right).

court cannot grant its permission to do so in a given case.

The issue is whether the trial court can permit self-representation, which turns on an intelligent and knowing waiver of counsel.

Although the court of appeals framed the issue in terms of the right of self-representation, the court essentially held that no trial court could permit a defendant to represent himself at a retrospective competency hearing. The Supreme Court, however, has not held that a defendant cannot represent himself at a competency hearing.[4] In the federal sphere "courts often employ the use of standby counsel during competency proceedings when the defendant had been proceeding *pro se*." Nicholas Smit, *The Right to Counsel? A Heightened Standard of Competence for Standby Counsel in Competency Hearings*, 8 FED. CTS. L. REV. 163, 181 (2014).

Further, the United States Supreme Court in *Martinez v. Ct. App. of California, Fourth Appellate Dist.*, explained that even when there is no constitutional right to self-representation on appeal, "Courts, of course, may still exercise their discretion to allow a lay person to proceed *pro se*." 528 U.S. at 163;

[4] No hard and fast rule applies to the right of an individual to waive counsel and proceed with self-representation in a civil commitment proceeding. Acknowledgment of such a right "varies among the states from allowing self-representation as in other suits, to giving the court discretion as to whether waiver and self-representation should proceed, to making the presence of counsel unwaivable." 53 AM. JUR. 2d Mentally Impaired Persons § 35 (citations omitted).

see also Thomas v. State, 286 S.W.3d 109, 113 (Tex. App.—Houston [14th Dist.] 2009, no pet.) ("There is no such rule [against self-representation].").

While the right to self-representation and right to counsel are "correlative rights," *Faretta*, 422 U.S. at 815, the non-existence of one right does not necessarily establish a denial of the other. The federal constitution requires only that a defendant's waiver of counsel be made intelligently and knowingly, and that is what the court of appeals ought to have determined in this case. *See Johnson v. Zerbst*, 304 U.S. 458, 465 (1938) ("The determination of whether there has been an intelligent waiver of right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience and conduct of the accused."). It was Appellant's complaint on appeal.

Moreover, there is no requirement of a standard higher than *Dusky v. United States*[5] to determine competency to stand trial. *Godinez v. Moran*, 509 U.S. 389, 399 (1993). And while states can require a higher standard to exercise the right of self-representation, *Indiana v. Edwards*, 554 U.S. 164, 174 (2008), Texas has not done so. Instead, the matter of effective waiver is properly left to the discretion of the trial court. *Chadwick v. State*, 309 S.W.3d 558, 563 (Tex. Crim. App. 2010) ("the trial judge . . . will often prove best able to make more fine-tuned mental capacity

[5] 362 U.S. 402, 402 (1960).

decisions, tailored to the individualized circumstances of a particular defendant.") (citing *Edwards*, 554 U.S. at 177).

Neither does Texas statutory law prevent a trial court from permitting *pro se* representation at a competency hearing. Defendants are "entitled to representation by counsel before any court-ordered competency evaluation and during any proceeding at which it is suggested that the defendant may be incompetent to stand trial." TEX. CODE CRIM. PROC. art. 46B.006(a). If the defendant is indigent and hasn't been appointed counsel, the trial court "shall appoint counsel as necessary to comply with that entitlement." *Id*. at 46B.006(b). The statute provides the ability to be represented by counsel, not a requirement that this occur.[6] *Compare with* OHIO REV. CODE § 2945.37(D) ("The defendant shall be represented by counsel at the hearing...").

The reasons to require counsel for a competency hearing don't apply here.

An intelligent and knowing waiver is not foreclosed here because the federal cases the court of appeals relied on do not apply to a retrospective competency proceeding. In *United States v. Purnett*, the Second Circuit held it was error to permit a defendant to represent himself at a competency proceeding because "[l]ogically,

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[6] *But see Davis v. State*, 484 S.W.3d 579, 586 (Tex. App.—Fort Worth 2016, no pet.) (relying on text of article 46B.006, along with evidence that fear induced waiver of counsel, in holding error not to appoint counsel before a competency evaluation).

the trial court cannot simultaneously question a defendant's mental competence to stand trial and at one and the same time be convinced that the defendant has knowingly and intelligently waived his right to counsel." 910 F.2d 51, 55 (2d Cir. 1990). The Supreme Court suggested this in *Pate v. Robinson*: "[I]t is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have the court determine his capacity to stand trial." 383 U.S. 375, 384 (1966).

However, the premise behind these concerns is absent at a retrospective hearing. Appellant's present competency is not at issue—only his past competency. Although competence may not be required for a *represented* defendant to participate in a retrospective competency hearing,[7] if there is no reason to doubt a defendant's present competence, there is no reason to absolutely bar to *pro se* representation at a retrospective hearing. Since Appellant's competency had been restored and has not been proven otherwise, the presumption of competence continues to apply. TEX. CODE CRIM. PROC. art. 46B.003(b). Barring self-representation simply because his competency should have been inquired into at an earlier time ignores that the nature

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[7] *In re State ex rel. Healey*, WR-82,875-01, 2017 WL 1048121, at *4 (Tex. Crim. App. Mar. 8, 2017) (Keller, P.J., & Yeary, J., dissenting in separate opinions) (not designated for publication); *see also In re Commitment of Fisher*, 164 S.W.3d 637, 654 (Tex. 2005) (no requirement of competency prior to civil sexually violent predator trial).

of mental illness "is not a unitary concept, but varies in degree, [and] can vary over time...."). *Edwards*, 554 U.S. at 165.

Federal courts recognize a similar distinction in refusing to require the appointment of counsel when a trial court revisits the issue of competency after a fair determination of the defendant's competency. *See, e.g., Porter v. Attorney Gen.*, 552 F.3d 1260, 1269 (11th Cir. 2008), *rev'd on other grounds by Porter v. McCollum*, 558 U.S. 30 (2009); *United States v. Morrison*, 153 F.3d 34, 47 (2d Cir. 1998). Even the cases cited by the court of appeals recognize that the potential problem is proceeding with self-representation *before* the question of competency to stand trial is resolved. *United States v. Klat*, 156 F.3d 1258, 1263 (D.C. Cir. 1998); *Purnett*, 910 F.2d at 56. Resolving these issues in an ideal sequence is much easier in a retrospective hearing. But even without a re-evaluation of competence, trial courts should be able to adopt a wait-and-see approach, ready to revoke permission to proceed *pro se* if the need arises. *See Faretta*, 422 U.S. at 834 n.46 (recognizing termination of self-representation may be necessary).

Conclusion

On such facts, the court of appeals should have found no abuse of discretion in the trial court's implicit conclusion that Appellant's waiver of counsel was intelligently and knowingly made. Instead, it exceeded the point of error raised and

erroneously adopted the absolute position that no retrospective-competency-hearing defendant could represent himself.

PRAYER FOR RELIEF

The State of Texas prays that the Court of Criminal Appeals grant this petition, reverse the court of appeals, and affirm Appellant's convictions.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that according to Microsoft Word's word-count tool, this document contains 2,460 words, exclusive of the items excepted by Tex. R. App. P. 9.4(i)(1).

/s/ *Emily Johnson-Liu*
Assistant State Prosecuting Attorney

CERTIFICATE OF SERVICE

The undersigned certifies that on this 23rd day of June 2021, the State's Petition for Discretionary Review was served electronically on the parties below.

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APPENDIX

Court of Appeals' Opinions

06-18-00197-CR & 06-18-00198-CR

2021 WL 1583890
Only the Westlaw citation is currently available.

Court of Appeals of Texas, Texarkana.

Edwin Antonio OSORIO-LOPEZ, Appellant

v.

The STATE of Texas, Appellee

No. 06-18-00197-CR
|
Date Submitted: January 13, 2021
|
Date Decided: April 23, 2021

Synopsis

Background: After denial of defendant's motion for continuance to allow for competency evaluation, defendant was convicted in the 115th District Court, Upshur County, of evading arrest or detention with a vehicle and aggravated assault with a deadly weapon. Defendant appealed The Court of Appeals abated case to trial court with instructions to conduct retrospective competency trial if it were feasible. The District Court conducted retrospective competency trial and found defendant to have been competent at initial jury trial.

On rehearing, the Court of Appeals, Stevens, J., held that defendant was not entitled to waive right to counsel and represent himself at retrospective competency hearing.

Reversed and remanded with instructions.

On Appeal from the 115th District Court, Upshur County, Texas, Trial Court No. 17914

Attorneys and Law Firms

Jonathan Hyatt, for Appellant.

Barry Clark Wallace, Billy W. Byrd, for Appellee.

Before Morriss, C.J., Burgess and Stevens, JJ.

OPINION

Opinion by Justice Stevens

***1** After a jury trial in Upshur County, Edwin Antonio Osorio-Lopez was convicted of evading arrest or detention with a vehicle and aggravated assault with a deadly weapon. Osorio-Lopez was sentenced to concurrent ten-year and twenty-year sentences, respectively.[1] On appeal of his conviction of evading arrest or detention with a vehicle, Osorio-Lopez claimed—as his sole point of error—that the trial court erred in not granting his motion for continuance to allow for a competency examination.[2]

1 *See* Tex. Penal Code Ann. §§ 38.04(2)(A), 22.02.

2 In companion cause number 06-18-00198-CR, Osorio-Lopez appeals from his conviction of aggravated assault with a deadly weapon. In that case, as in this one, Osorio-Lopez claimed that the trial court erred in not granting his motion for continuance to allow for a competency examination.

By order dated August 14, 2019, we sustained Osorio-Lopez's point of error and abated this case to the trial court with instructions to conduct a retrospective competency trial, if such a trial were feasible. After having determined that a retrospective competency trial was feasible, the trial court conducted the retrospective competency trial on February 25, 2020, and found Osorio-Lopez to have been competent at the trial resulting in the convictions that are the subjects of his appeals. Following abatement, we granted Osorio-Lopez's motion for rehearing. After having been afforded the opportunity for further briefing following abatement, Osorio-Lopez contends that the trial court abused its discretion (1) by granting defense counsel's oral request to withdraw at the retrospective competency trial and by allowing Osorio-Lopez to represent himself during that proceeding, (2) by admitting evidence against him during the retrospective competency proceeding, and (3) by not finding sufficient evidence of his incompetency. Because we find that Osorio-Lopez should have been represented by counsel at the retrospective competency hearing, we reverse the trial court's competency determination and remand for a new retrospective competency hearing.[3]

[3] Based on this determination, we need not address Osorio-Lopez's remaining points of error.

I. Factual and Procedural Background

On February 5, 2018, Osorio-Lopez was scheduled to enter guilty pleas on charges of evading arrest or detention with a vehicle and unauthorized use of a motor vehicle. Osorio-Lopez declined to enter guilty pleas and instead elected to proceed to trial before the court. On February 13, 2018, Osorio-Lopez returned to court for a pretrial hearing. The trial court acknowledged that the case was set for a bench trial that afternoon but stated that Osorio-Lopez's interpreter and the attorneys had expressed some concerns about Osorio-Lopez's competency. The trial court then proceeded to explain the adversarial process to Osorio-Lopez and confirmed that he had a seventh-grade education. Osorio-Lopez indicated that he had experienced mental and emotional problems and had been hospitalized in Wichita Falls following a period of incarceration in Fort Worth. At the conclusion of the hearing, the trial court ordered Osorio-Lopez to be examined by Tom Allen, Ph.D., to determine Osorio-Lopez's competency to stand trial.

***2** Allen issued an evaluation report in which he concluded that Osorio-Lopez was incompetent to stand trial.[4] According to Allen, Osorio-Lopez "appeared to be having considerable difficulty responding to many questions in linear, logical fashion and tended to provide rambling responses and memorial details were very vague." Allen further concluded that Osorio-Lopez exhibited paranoid ideation and suffered from impaired insight. Based on Allen's report, the trial court found Osorio-Lopez incompetent to stand trial and, in conformity with Article 46B.073 of the Texas Code of Criminal Procedure, ordered Osorio-Lopez's commitment to Rusk State Hospital on April 26, 2018, for a period not to exceed 120 days for further examination and treatment.

[4] Allen diagnosed Osorio-Lopez with "Psychotic Disorder NOS," "Cannabis Use Disorder," and "Stimulant Use Disorder by History in Remission." The report noted that Osorio-Lopez was prescribed and was taking antipsychotic medication and medication for allergies and anxiety.

On August 8, 2018, the trial court was advised by Larry Hawkins, M.D., unit psychiatrist at Rusk State Hospital that, after a period of observation and treatment, Osorio-Lopez was re-evaluated and was determined to be competent to stand trial. Hawkins warned, "Current medications are necessary to maintain the defendant's competence."[5] A new trial date was scheduled for October 8, 2018.

[5] A report dated July 31, 2018, by Sarah J. Rogers, Ph.D., of Rusk State Hospital stated,

> With respect to all assessed capacities, Mr. Osorio-Lopez has a factual understanding as well as rational appreciation of the proceedings against him. Further, he possesses the capacity to consult with his attorney with a reasonable degree of rational understanding. Maintenance of these capacities involves medication adherence and continued stability in his symptoms.

Three days before the scheduled trial, Osorio-Lopez's appointed counsel filed a motion to withdraw. Counsel informed the trial court that Osorio-Lopez requested that counsel withdraw because Osorio-Lopez could not communicate with counsel. When the trial court asked Osorio-Lopez to explain, he stated that he had a problem in Fort Worth involving a false identification. Osorio-Lopez told the trial court that there was a report from an official who detained him stating that counsel did not listen to Osorio-Lopez. He also told the trial court that counsel threatened him on several occasions and sided with the police officers.

Trial counsel explained that Osorio-Lopez was referring to a case he had in Tarrant County in which he was represented by a different attorney. After the trial court explained to Osorio-Lopez that this case had nothing to do with Fort Worth, Osorio-Lopez stated that counsel would not be able to defend him because of the issue he had the first time. Osorio-Lopez remained adamant that appointed counsel in the current case was the same attorney who represented him in Fort Worth. Counsel stated that he never had a case in Fort Worth. The trial court denied the motion to withdraw.

Following jury selection, Osorio-Lopez's court-appointed counsel filed a verified motion for continuance outlining his inability to effectively communicate with Osorio-Lopez. The motion stated that, after Osorio-Lopez was determined to be competent and was returned to Upshur County, he was able to effectively communicate with counsel in writing and with the help of counsel's bi-lingual assistant. Counsel went on to state,

> Communications have deteriorated to the point that Defendant is adamant that undersigned counsel had represented him on a prior matter in Tarrant County and despite all attempts of Undersigned Counsel and the court appointed interpreter to convince him otherwise,

this thought remains with Defendant. Defendant deems any advice of undersigned counsel to be against his best interest. Trial Counsel requests a continuance to have Dr. Thomas Allen examine Defendant again for competency.

***3** At the hearing on the motion, counsel elaborated,

> As we got closer to jury selection and with communications I was able to do through [the interpreter,] it seemed to me that he was starting to have irrational thoughts, for instance, one the court is aware where he thought I represented him in another county in another matter and in his opinion had sold him out on a prior criminal matter. At jury selection[,] he presented written documentation to [the interpreter] that [the interpreter] was able to translate and get back to me last Thursday afternoon and was information he thought would be helpful in his defense. However, it appeared to me that he obviously had a lot of in my opinion irrational thoughts that he deemed were factual. And in furtherance of that[,] this morning he's made serious communications with me about things that he thinks or believes is happening down in the jail that would be horrific if true but to me seem to be irrational thoughts.... [H]e basically goes against every piece of advice I give him and gone as far as not signing essential documents like the application for community supervision because he thinks my advice is against his best interest. I am requesting a continuance in both cases to have ... Dr. Tom Allen examine him again to deem whether or not he's competent because I feel like he's not competent to communicate with me to present a defense today.

On this evidence, we determined that there was some evidence to support incompetency and sustained Osorio-Lopez's claim that the trial court erred in failing to grant his request for a formal competency evaluation. We abated this case to the trial court to determine whether it was feasible to conduct a retrospective competency trial, and if so, the trial court was ordered to conduct such a hearing. *See* Tex. Code Crim. Proc. Ann. ch. 46B, subch. C; *Turner v. State*, 422 S.W.3d 676, 696–97 (Tex. Crim. App. 2013). By order dated November 7, 2019, the trial court determined that a retrospective competence trial was feasible, "given the current availability of evidence, other pertinent considerations and even given the passage of more than one year since the original trial of this matter."

At the February 25, 2020, retrospective competency hearing, counsel for Osorio-Lopez asked his client if he understood that counsel was his counsel at trial, to which Osorio-Lopez responded:

> Yes, I understand you were my present attorney but I had a change of attorney when he said the last court hearing when I was with the other attorney that he was going to leave when the other one returned. So my attorney sent me the last letters. And my attorney, doctor, judge told me that I was competent to be in court, to the rule of the court.

Defense counsel then asked Osorio-Lopez, "Would you like for me to ask questions of the State's witness or are you wanting to ask the questions yourself?" Osorio-Lopez responded, "I want to be my own judge, my own attorney to listen to the rules to see if I'm competent for that to return under oath." Defense counsel then indicated that he had no further questions.

***4** The trial court then asked Osorio-Lopez if he understood that he had "the right to have an attorney present with [him.]" Osorio-Lopez responded, "[I] lost him to see who I could -- I'm going to be representing myself." The trial court asked Osorio-Lopez if he wanted to represent himself, and Osorio-Lopez said, "Yes." The trial court responded, "All right. That's fine."

The State then indicated that it "agreed to stipulate to the doctor's report," the most recent of which was drafted in December 2019. That report indicated that Osorio-Lopez was competent to proceed in the retrospective competency hearing.[6] The trial court, at the State's request, took judicial notice of "those files."

6 The State indicated,

> [P]rior to calling any witnesses, we have agreed to stipulate to the doctor's report, the Court should have those available in their file. If the Court does not have them available, I do have copies for the Court. The most recent one was in December of 2019, which is referring to the proceedings here today that found Mr. Lopez competent to proceed in this competency trial.

The December 2019 report from Thomas G. Allen, Ph.D., to the trial court indicated that Osorio-Lopez was competent to stand trial (on the issue of his competency to stand trial at the original trial). The report stated that Osorio-Lopez "demonstrate[d] an adequate factual and rational understanding of the proceedings against him and ... [had] sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding if he so [chose]."

Jon Kregel, a licensed translator for the State of Texas, testified that he was appointed by the trial court to translate for Osorio-Lopez and that he did so on many occasions.

Although Kregel did not have any issues translating for Osorio-Lopez, he explained that Osorio-Lopez had some difficulty understanding the process and procedures.

Kregel was present for each of Osorio-Lopez's three psychological evaluations. Osorio-Lopez was found incompetent to proceed as a result of the initial evaluation and was found competent to proceed as a result of the second two evaluations. Kregel did not notice any difference in Osorio-Lopez's ability to understand "what was going on in those three evaluations." Kregel did notice, however, a difference in Osorio-Lopez's behavior and how he accepted what Kregel explained to him. Kregel explained that, sometimes, Osorio-Lopez was more receptive and that, at other times, he did not want to hear "what [Kregel had] to say at all."

Kregel further testified that he was able to talk to Osorio-Lopez as if he were from the same country. Kregel has visited Honduras on many occasions and is familiar with the culture. He agreed with the report tendered to the trial court that indicated that Osorio-Lopez's behavior was "more consistent with indoctrination by his culture than any incompetency" and stated that he was not concerned with Osorio-Lopez's competency.[7] He was more concerned about "his general demeanor" and willingness to follow instructions. He explained, "When you give him an explanation about something and he's not interested ..., he basically shuts off literally and then doesn't hear anything else you say to him after that." Osorio-Lopez, acting pro se at the retrospective competency hearing, declined to question Kregel.

[7] This testimony appears to relate to Osorio-Lopez's competency at the time of the retrospective competency trial rather than his competency at the time of the trial of conviction. The December 2019 competency evaluation indicated that "[i]deation was paranoid, but he expressed beliefs that appeared cultural rather than delusional. For example, [Osorio-Lopez stated that] people control his life with 'black Maya' or 'white witchcraft' and even though he grew up believing in God he has been unable to control the 'black Maya influences.' " The report finding Osorio-Lopez competent to stand trial following his psychiatric hospitalization makes no mention of cultural issues. Because we are reversing the trial court's competency determination and remanding the case for a new competency hearing, we express no opinion whether Kregel was qualified to testify to an opinion that Osorio-Lopez was competent. *See* Tex. Code Crim. Proc. Ann. arts. 46B.021(a)(2), art. 46B.022.

***5** Billy Wayne Byrd, the district attorney for Upshur County, testified that he was present at Osorio-Lopez's pretrial hearings and trial. Byrd cross-examined Osorio-Lopez at an initial pretrial hearing and felt that that there was a "potential issue" based on Osorio-Lopez's blank stare and his responses, which had nothing to do with the questions asked. At that point, he raised the issue of Osorio-Lopez's competency with the trial court. Osorio-Lopez was thereafter evaluated and determined to be incompetent to stand trial. After Osorio-Lopez was released from the hospital and was declared competent, Byrd participated in his jury trial representing the State. At trial, based on Byrd's opinion and observations, Osorio-Lopez was able to understand the proceedings and often responded in English before the interpreter had the opportunity to translate. Osorio-Lopez was responsive and attentive. He answered Byrd's questions while looking directly at him. Byrd had no concerns regarding Osorio-Lopez's competency at trial.

Osorio-Lopez's brief cross-examination of Byrd was difficult to follow:

> Q Are you competent to say in court that you were accusing me with Mr. Michael that was in Fort Worth when he had the last court in Fort Worth?
>
> A I'm sorry, can you re-translate that again, the question. Did you say Michael?
>
> Q Are you competent here to stand here to say that you were competent to say that I had a hearing in Fort Worth, a hearing there in Fort Worth?
>
> A I can't respond of what may or may not have happened in Fort Worth, Texas. What the Court and what I was concerned with were the proceedings here in Upshur County, Texas.
>
> Q Okay. Thank you.

The court then announced that it had determined that Osorio-Lopez "was competent at his trial in which jury selection occurred on October the 8th and trial proceeded on October the 16th." Following the hearing, the trial court issued its February 25, 2020, order concluding that Osorio-Lopez was competent at the time of his October 2018 jury trial.

II. Osorio-Lopez Should Have Been Represented by Counsel at the Retrospective Competency Hearing

The Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 10, of the Texas Constitution provide that in all criminal prosecutions, a defendant has the right to assistance of counsel. U.S. Const. amends., VI, XIV; Tex. Const. art. 1, § 10; *see Faretta v. California*, 422 U.S. 806, 819, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975); *Collier v. State*, 959 S.W.2d 621, 625 (Tex. Crim. App. 1997). This constitutional guarantee has been held to include critical events in a criminal prosecution such as a competency hearing. *See Estelle v. Smith*, 451 U.S. 454, 469–71, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981) (recognizing Sixth Amendment right to counsel when defendant undergoes psychological examination); *Kirby v. Illinois*, 406 U.S. 682, 688–89, 92, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972) (under the Sixth Amendment, a person is entitled to the help of a lawyer "at or after the time that adversary judicial proceedings have been initiated against him ... whether by way of formal charge, preliminary hearing, indictment, information, or arraignment").

Here, although Osorio-Lopez was appointed counsel for the retrospective competency hearing, he told the trial court that he wanted to represent himself, and the trial court permitted him to do so. We conclude that the trial court erred in permitting Osorio-Lopez's attorney to withdraw without appointing new counsel to represent Osorio-Lopez at the retrospective competency hearing.

Osorio-Lopez points to the record in support of his claim that his purported waiver of the right to counsel failed to satisfy constitutional standards. *See Faretta*, 422 U.S. at 819, 95 S.Ct. 2525. Nevertheless, our conclusion that the trial court erred in allowing Osorio-Lopez to represent himself at the retrospective competency hearing is not based on any alleged shortcomings in the trial court's admonishments, but instead our conclusion is based on the inapplicability of the right to self-representation in the proceeding below, i.e., one to determine Osorio-Lopez's competency at the trial of conviction.

***6** When the issue of the defendant's competency is pending, federal courts have concluded that a defendant may not be permitted to waive the right to counsel. *See United States v. Ross*, 703 F.3d 856, 869 (6th Cir. 2012); *United States v. Zedner*, 193 F.3d 562, 567 (2d Cir. 1999) (per curiam); *United States v. Klat*, 156 F.3d 1258, 1263 (D.C. Cir. 1998); *United States v. Purnett*, 910 F.2d 51, 55 (2d Cir. 1990) ("Logically, the trial court cannot simultaneously question a defendant's mental competence to stand trial and at one and the same time be convinced that the defendant has knowingly and intelligently waived his right to counsel."). "These cases support a common-sense viewpoint that a defendant cannot represent himself at his own competency hearing, the purpose of which is to determine whether a defendant understands and can participate in the proceedings in the first place." *Ross*, 703 F.3d at 869.

In *Klat*, for example, the court held that a defendant whose competency is reasonably in question "may not proceed *pro se* until the question of her competency to stand trial has been resolved." *Klat*, 156 F.3d at 1263. The court found support for this conclusion in *Pate v. Robinson*, 383 U.S. 375, 384, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966), in which the Supreme Court observed that "[i]t is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have the court determine his capacity to stand trial." Although we recognize that the hearing at issue here was a retrospective competency hearing designed to determine whether Osorio-Lopez was competent to stand trial in October 2018, we, nevertheless, find the logic of these cases compelling and conclude that Osorio-Lopez was not entitled to represent himself.

Because Osorio-Lopez should have been represented by counsel at the retrospective competency hearing, he is entitled to a new retrospective competency hearing at which he is represented by counsel.

III. Conclusion

We reverse the trial court's competency determination. We abate and remand to the trial court for a new retrospective competency hearing. The trial court is instructed to appoint counsel to represent Osorio-Lopez at the hearing who will not be a potential witness at that hearing.

All Citations

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Court of Appeals of Texas, Texarkana.

Edwin Antonio OSORIO-LOPEZ, Appellant

v.

The STATE of Texas, Appellee

No. 06-18-00198-CR
|
Date Submitted: January 13, 2021
|
Date Decided: April 23, 2021

On Appeal from the 115th District Court, Upshur County, Texas, Trial Court No. 17927

Attorneys and Law Firms

Billy W. Byrd, Sarah Cooper, Barry Clark Wallace, for Appellee.

Jonathan Hyatt, for Appellant.

Before Morriss, C.J., Burgess and Stevens, JJ.

MEMORANDUM OPINION

Memorandum Opinion by Justice Burgess

***1** After a jury trial in Upshur County, Edwin Antonio Osorio-Lopez was convicted of evading arrest or detention with a motor vehicle and aggravated assault with a deadly weapon. Osorio-Lopez was sentenced to concurrent ten-year and twenty-year sentences, respectively.[1] On appeal of his conviction of aggravated assault with a deadly weapon, Osorio-Lopez claimed that the trial court erred in not granting his motion for a continuance to allow for a competency examination[2] and that the evidence was insufficient to establish that a food tray was a deadly weapon.

1 *See* Tex. Penal Code Ann. §§ 38.04 (2)(A), 22.02.

2 In companion cause number 06-18-00197-CR, Osorio-Lopez appeals from his conviction of evading arrest or detention with a vehicle. In that case, as in this one, Osorio-Lopez claimed that the trial court erred in not granting his motion for a continuance to allow for a competency examination.

By order dated August 14, 2019, we sustained Osorio-Lopez's first point of error and abated this case to the trial court with instructions to conduct a retrospective competency trial, if such a trial were feasible. After having determined that a retrospective competency trial was feasible, the trial court conducted the retrospective competency trial on February 25, 2020, and found Osorio-Lopez to have been competent at the trial resulting in the convictions that are the subjects of his appeals. Following abatement, we granted Osorio-Lopez's motion for rehearing. After having been afforded the opportunity for further briefing following abatement, Osorio-Lopez contends that the trial court abused its discretion (1) by granting defense counsel's oral request to withdraw at the retrospective competency trial and by allowing Osorio-Lopez to represent himself during that proceeding, (2) by admitting evidence against him during the retrospective competency proceeding, and (3) by not finding sufficient evidence of his incompetency.

In our companion cause number 06-18-00197-CR styled, *Edwin Antonio Osorio-Lopez v. The State of Texas*, we addressed Osorio-Lopez's first issue and found that, because Osorio-Lopez should have been represented by counsel at the retrospective competency hearing, he was entitled to a new retrospective competency hearing. For the reasons expressed in that opinion, we find that, in this case, Osorio-Lopez is, likewise, entitled to a new retrospective competency hearing.

We reverse the trial court's competency determination. We abate and remand to the trial court for a new retrospective competency hearing. The trial court is instructed to appoint counsel who will not be a potential witness at the competency hearing to represent Osorio-Lopez at that hearing.[3]

3 Based on this disposition, we need not address Osorio-Lopez's remaining points of error.

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